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In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN E. MURRAY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was convicted of filing false Customs declarations and conspiring to do so under an erroneous construction of the term "substantial transformation" in the Customs regulation defining "country of origin."

2. Whether the burden of proof was improperly shifted to petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15) was entered on May 15, 1980. The petition for a writ of certiorari was filed on June 13, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiracy to defraud the United States Customs Service in its assessment and collection of duties owed on imported merchandise, in violation of 18 U.S.C. 371, and on 21 counts of willfully importing merchandise by means of false and fraudulent documentation, in violation of 18 U.S.C. 542 and 2. Petitioner was sentenced to two years' imprisonment, all but six months of which was suspended in favor of two years' probation, and he was fined $20,000.[1] The court of appeals affirmed (Pet. App. 1-14).

The evidence is summarized in the court of appeals' opinion (Pet. App. 5-6). The government's proof showed that petitioner, the vice-president and executive officer of Nicholson and Company, an importer of animal glue, conspired with Bas Trommelen, the chief operating officer

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[1]John Murray, Sr., petitioner's father and president of the company of which petitioner was vice-president and executive officer, predeceased the return of the indictment but was named therein as an unindicted co-conspirator. Stephen Hopkins, petitioner's nephew and a vice president of the firm who was in charge of its daily operations when petitioner was absent, was acquitted by the jury on all counts. The indictment against Bas Trommelen, petitioner's Dutch contact, was dismissed, and he testified on behalf of the government.

of a Dutch dealer and manufacturer of glue, to import into the United States Chinese glue falsely identified as originating in Holland in order to take advantage of a lower rate of duty. The essence of the scheme was that petitioner's firm purchased Chinese glue through European brokers, who shipped the glue to Holland, where petitioner purported to sell it to Trommelen at prices lower than petitioner had paid his brokers. The glue was then trucked to Trommelen's factory, where it was rebagged and purportedly sold to petitioner for the same price at which he had "sold" it to Trommelen, plus charges for the trucking in Holland, the rebagging at Trommelen's factory, and Trommelen's loss of interest on the money he paid petitioner that petitioner subsequently repaid to him. Thereafter, the glue was shipped to the United States, where petitioner regularly filed Customs declarations identifying Holland as the "country of origin" of the glue.

In response to the government's overwhelming evidence, supplied in large part by the testimony of Trommelen, that nothing was done to the glue at the Dutch plant except for rebagging, petitioner presented evidence that some refining may have taken place, which, he argued, effected a "substantial transformation" in the glue rendering Holland the glue's "country of origin."

ARGUMENT

1. 19 C.F.R. 134.1(b) defines "country of origin" as

> the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part.

Petitioner contends (Pet. 10) that the court of appeals erroneously held that, for the purpose of determining an article's "country of origin," a change in economic value is the sole criterion of "substantial transformation." He further contends that the court's holding conflicts with other judicial interpretations and with the Customs Service's own regulations. The First Circuit's construction of the term "substantial transformation" is, however, neither erroneous nor novel.

The court of appeals' decision is correct, we submit, because one can hardly conceive of a case in which there would be a sufficient *physical* change in an article to render it "substantially transformed" without there being a concomitant significant change in the article's *economic* value. Indeed, even if such a case can be imagined, the present case, in which the overwhelming evidence revealed no change either in the physical makeup or in the economic value of the glue, is not it. Petitioner's quarrel with the First Circuit's construction of "substantial transformation" thus has nothing to do with this case, in which the government's evidence amply established that the only thing that was done to the glue in Holland was to rebag it.[2]

Moreover, there is no conflict between, on the one hand, the court of appeals' decision in this case and, on the other hand, the decisions of the Court of Customs and Patent Appeals and the Customs Court and the administrative rulings of the Customs Service that petitioner contends establish that physical change is the sole criterion of "substantial transformation." The First

[2]From the complicated arrangements that petitioner made to conceal that China was the ultimate country of origin of the glue, it is clear that he recognized that nothing was being done to the glue in Holland that would satisfy the "substantial transformation" requirement.

Circuit's decision nowhere holds that a "change in economic value is the sole determinant" of an article's country of origin (Pet. 10). Rather, the court below held that "the sub-term 'substantial transformation' means a fundamental change in the form, appearance, nature, or character of an article which adds to the value of the article an amount or percentage which is significant in comparison with the value which the article had when exported from the country in which it was first manufactured, produced, or grown" (Pet. App. 10). The court of appeals thus did not ignore the need for physical change.[3] Nor do the Customs rulings upon which petitioner relies hold value enhancement irrelevant. In each of them, something had been done to the goods that cost money and that did enhance their value; the only remaining question was whether what had been done had effected a sufficient physical transformation.[4]

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[3]Prior to construing "substantial" as the modifier of "transformation" and as having an economic meaning, the court of appeals defined "transformation" (Pet. App. 9) as

> a *fundamental* change, not a mere alteration, in the form, appearance, nature, or character of an article. As is indicated by its first syllable, it means a change which carries an article or other object *across* from one class to another class. When used to aid in the determination of the appropriate rate of duty under a tariff schedule it means such a change as to move the article either from one to another of the classes established by official tariff schedules, or from one to another of the classes of goods, wares, and merchandise commonly recognized in the commercial markets where such articles are traded.

[4]*E.g.*, *Parodi Erminio & Co.* v. *United States*, C.D. 485, 6 Cust. Ct. 288, 290 (1941) (holding Spain the "country of origin" of Spanish olive oil that was filtered and repacked in France); T.D. 45611(19), 61 Treas. Dec. 873 (1932) (Chinese silk dyed, printed, and finished in Great Britain held British goods); *A.S. Beck Shoe Corp.* v. *United States*, T.D. 48724, 70 Treas. Dec. 1009, 1011 (Cust. Ct. 1936) (holding "small amount of [fur] trimming" added in Canada to Czechoslavakian shoes did not change country of origin); *United*

In any event, the trial court's instructions placed the question whether there had been a requisite physical transformation of the glue squarely before the jury. The trial court explained the concept of "substantial transformation" as follows (17 Tr. 25-26):

> Your difficulty will be with the words substantial transformation. Perhaps this will be of some help to you. My thought is that a cosmetic difference will not work a substantial transformation. A shave and a haircut would not change a man. A disguise, false mustache, eye glasses, will not work a substantial change: it will work only an inconsequential one.
>
> Now, what happened to that glue in Holland is not my decision; it is yours. If nothing happened, if that is your finding, except a rebagging procedure, then the country of origin was China. If something was done, determine for yourselves whether there was an insubstantial change or a substantial transformation. If it was an insubstantial change, the country of origin remains China. If there was a substantial transformation, then the country of origin of that glue when it entered the United States was Holland.

States v. *Gibson-Thomsen Co., Inc.*, C.A.D. 98, 27 C.C.P.A. 267, 273, (1940) (holding that combining bristles with handles to make brushes was sufficient processing so that "each loses its identity in a tariff sense and becomes an integral part of a new article having a new name, character, and use"); *Midwood Industries, Inc.* v. *United States*, C.D. 4026, 64 Cust. Ct. 499, 507 (1970) (holding rough forgings processed into usable flanges by "cutting, boring, facing, spot-facing, drilling, tapering, threading, bevelling, and heating and compressing" had undergone a "transformation * * * into different articles having a new name, character and use").

> But you will decide what was the actual country of origin. The Judge will not do so for you.[5]

Nowhere in this instruction did the trial judge allude to the need for any enhancement in the economic value of the glue before the jury could find that its "country of origin" had changed from China to Holland. In short, the jury found petitioner guilty under the same standard he now urges in this Court.[6]

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[5]In the court of appeals, petitioner argued that the foregoing instruction was inadequate because it was largely a restatement of the literal language of 19 C.F.R. 134.1(b) that could have permitted the jury to find that the glue had not been substantially transformed even if it found that it had been changed into a new product with a new use. The words "substantial transformation," however, are words of common usage and meaning that require no further explanation or definition. Nevertheless, the trial court added to the plain language of the regulation its own effective language concerning "cosmetic" changes, stating the issue fairly, logically, impartially and in terms that could not have misled the jury. *Elbel* v. *United States*, 364 F. 2d 127, 134 (10th Cir. 1966).

[6]Although not stated as a separate issue in the petition, it is apparently petitioner's position (Pet. 8-9) that the court of appeals erred in upholding the trial court's refusal to permit petitioner to cross-examine Trommelen regarding whether he had exported any of the Chinese glue "purchased" by him from petitioner to European Economic Community nations during 1972-1974, which result petitioner ascribes to the court's assertedly erroneous construction of the term "substantial transformation." At trial, petitioner was permitted to ask Trommelen whether he ever had shipped any Chinese glue to Common-Market countries, to which Trommelen replied "very low percentage" (12 Tr. 39). Thereafter, the district judge refused to permit further inquiry into whether Trommelen had, in fact, sold Chinese glue to Common-Market countries, on the ground that, while such evidence might be relevant, its admission would create confusion and undue delay and it was within his power "to block further inquiry into it" (12 Tr. 40A). The court of appeals upheld the district court's ruling, stating (Pet. App. 13) that "[e]ven if the district judge erred in not permitting the cross-examination, [petitioner was] not * * * prejudiced" because the proffered cross-

2. Petitioner also contends (Pet. 17-19) that the court of appeals erroneously imposed upon him the burden of coming forward with proof of his innocence. Specifically, he points to that court's observation (Pet. App. 12-13) that "there was not sufficient evidence that the glue had undergone a 'substantial transformation' in Holland for the trial judge to have submitted to the jury the question whether it was the country of origin." Regardless of the abstract merit of petitioner's contention, it is wholly insubstantial in the present case. Petitioner was in no way prejudiced by the court of appeals' observation, which was merely dictum, since, as discussed above, the trial court in fact submitted the issue of "substantial transformation" to the jury.[7] Moreover, throughout its charge to the jury, the trial court repeatedly emphasized that the burden of proving petitioner's guilt beyond a reasonable doubt was on the government (17 Tr. 4, 10-14) and that petitioner was under no burden whatsoever to prove his innocence (17 Tr. 13).

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examination did not relate to the issue of change in the glue's economic value.

Whether or not the reasoning employed by the court of appeals was valid, it is clear that it was well within the district court's discretion to exclude further cross-examination regarding a possible violation of Dutch law, where that testimony might have confused or misled the jury and where the witness already had been rigorously and extensively cross-examined by both defense attorneys over a period of two days. Fed. R. Evid. 403. In any event, this largely fact-bound, evidentiary question does not warrant this Court's review.

[7]The complained-of dictum obviated the need for the court of appeals to rule on petitioner's objection to the trial court's charge on "substantial transformation," which, as discussed in note 5, *supra*, is without merit in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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